

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JUNIOR JOHNSON,

Defendant-Appellant.

---

UNPUBLISHED

October 14, 2004

No. 246937

Wayne Circuit Court

LC No. 02-011051

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life without parole for the murder conviction and two to four years for each of the assault convictions, and was sentenced to a consecutive two-year term for the felony-firearm conviction. We reverse and remand.

I

Defendant was charged with murder and two counts of assault with intent to commit murder following a drive-by shooting in Detroit in which Freddie Bishop was shot and killed and two companions were injured. Sometime around midnight on August 13, 2002, Bishop and the companions, Eugene Fisher and James Robinson, were standing at a bus stop when a red dot from a laser beam was spotted on Bishop's chest. Seconds later, shots were fired from a passing car, from which the laser beam was directed, and the three men started running. More shots were fired. Fisher saw the red dot on the glass of the bus stop, and the glass shattered. Fisher and Robinson suffered only minor injuries, but Bishop was later found dead on the ground nearby. The shooting allegedly culminated an ongoing dispute between defendant and Bishop, and their friends.

Several hours later, the police were called to a firebombing of a house in Detroit, where defendant lived with his aunt. The police investigation of the firebombing revealed that it may be connected to the earlier drive-by shooting. After defendant was questioned at the firebombing, he was arrested in connection with the homicide. Defendant initially denied involvement in the shooting, telling police that his girlfriend had driven him to his baby's

mother's home that evening. He later gave a statement confessing that he fired the shots at Bishop and the others earlier in the evening, but that he never intended to hurt anyone.

## II

The key issue presented is whether the trial court erred in requiring defendant to choose between jury instructions on lesser included offenses and an alibi defense on the ground that they were inconsistent theories. Because there was evidence supporting instructions on the lesser included offenses as well as the alibi defense, we hold that the limitation imposed by the trial court was error. Reversal of defendant's convictions is required because the prosecution has failed to show that the error was harmless beyond a reasonable doubt.

### A

Whether presentation of an alibi defense precludes a defendant from receiving instructions on inferior offenses is a question of law. This Court reviews de novo questions of law and claims of instructional error. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003); *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Defendant claims that he was denied the right to present a defense, a constitutional issue that this Court also reviews de novo. *Id.*

### B

On the third day of trial, after the prosecution rested, the trial court ruled that pursuant to *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), defendant was not permitted to have an instruction on the lesser included offense of involuntary manslaughter<sup>1</sup> with regard to the murder charge if he claimed an alibi defense, i.e., that he was not at the shooting scene, because the theories were inconsistent. We find the court's ruling erroneous. Although the court provided no further explication for its reliance on *Cornell*, we find no support in *Cornell* for the court's reasoning.

In *Cornell*, the Court addressed the proper analysis for determining when a lesser included offense instruction must be given. *Id.* at 359. The Court held that "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357. The Court's mention of a lesser included offense instruction vis-à-vis an alibi defense occurred only by way of an example. *Id.* at 357 n 11. The Court pointed out that the absence of a disputed issue of fact between a greater offense and a lesser offense precludes an instruction on the lesser included offense. As an example, the Court noted that in *People v Cargill*, a companion case to *People v Kamin*, 405 Mich 482; 275 NW2d 777 (1979), the defendant claimed an alibi defense with

---

<sup>1</sup> The court's ruling also encompassed lesser included offense instructions with regard to the other charges against defendant, i.e., the two counts of assault with intent to commit murder.

respect to a charge of armed robbery, and was not entitled to an instruction on the lesser included offense of unarmed robbery because there was no dispute that the robbery was armed:

Defense counsel requested that the jury be instructed on unarmed robbery, among other lesser included offenses. The undisputed evidence established that the men who robbed the store were armed with a sawed-off shotgun and that they took the money with force or threat of violence. The defendant's defense was alibi. The only question that the jury was required to resolve was whether defendant was one of the men present when the crime was committed. It was not required to resolve a dispute about whether the men were armed. Thus, the factual issue was the same with respect to both the lesser and greater offenses, and there was "no evidence which would justify the jury in concluding that the greater offense was not committed and the lesser included offenses were committed." [*Id.* at 357 (citation omitted).]

We disagree that *Cornell* stands for the proposition that a defendant is never entitled to an instruction on a lesser included offense if his defense is alibi because the theories are inconsistent, i.e., a defendant is arguing both that he was not at the scene of the crime, and even if he was, he was not guilty of the offense charged, but only a lesser offense. A defendant may maintain inconsistent defenses,<sup>2</sup> and pre-*Cornell* decisions hold that, in general, a defense of alibi does not preclude an instruction on a lesser included offense. "[A]ssertion of an alibi defense does not deprive a defendant of his right to instruction on appropriate lesser included offenses." *People v Bryant*, 80 Mich App 428, 432; 264 NW2d 13 (1978). The *Bryant* Court explained:

Although there is merit to the argument that it is inconsistent for a defendant to both assert that he was not at the scene of the crime and that, if he was, the crime he committed was a lesser offense than that charged, a defendant "may advance inconsistent claims and defenses." *People v John Williams*, 26 Mich App 218, 222; 182 NW2d 347, 349 (1970).

"A defense of alibi, *per se*, does not mean that a defendant may not be convicted of a lesser offense. A jury may disbelieve a defendant's alibi but nevertheless find that a disputed element of the principal charge was not proven." *People v Membres*, 34 Mich App 224, 232 n 7, 191 NW2d 66 (1971). [*Bryant*, *supra* at 431-432.]

The discussion in *Cornell*, *supra* at 357 n 11, does not change the existing law with regard to alibi defenses. Under existing law, defendant's defense of alibi does not preclude his entitlement to an instruction on the lesser included offense of involuntary manslaughter. The circumstances in this case are not analogous to those in *Kamin*, *supra*, discussed in *Cornell*. In this case, although defendant claimed that he was not at the scene of the shooting, that was not the sole factual dispute for the jury to resolve. Unlike in *Kamin*, there was a disputed factual element that was not part of the lesser included offense. As the court instructed the jury, to

---

<sup>2</sup> See MCR 2.111(A)(2)(b); *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997).

establish first-degree murder, the prosecution had to prove that defendant intended to kill Bishop, that the intent to kill was premeditated, and that the killing was deliberate. However, there was evidence, which, if believed by the jury, established that the killing was inadvertent. In defendant's statement to the police, presented as evidence in the prosecutor's case-in-chief, defendant admitted shooting the gun, but stated that he "pointed the gun out the window and started shooting at them [Bishop and his companions]" and further stated, "I just want to say that I'm sorry. I was just shooting. I didn't mean for anyone to get hurt." Unlike in *Kamin*, the jury could have concluded that the greater offense was not committed and the lesser included offense was committed. *Cornell, supra* at 357 n 11.

Moreover, we note that the evidence creating the factual dispute concerning whether the shooting was first-degree murder was presented by the prosecutor, not defendant. Although we do not find this circumstance determinative, it further supports our conclusion that forcing defendant to choose between his defense of alibi and a lesser included offense instruction with regard to the charge of first-degree murder was error.

The court gave defendant a choice of pursuing his alibi defense or receiving the lesser included offense instructions, which the court indicated were supported by the evidence. Defendant opted to receive the lesser included offense instructions and thereby had to forego presenting his defense of alibi, including the presentation of alibi witnesses and introduction of his first statement to the police in which he denied involvement in the shooting. The trial court erred in requiring defendant to choose between receiving the lesser included offense instructions and presenting an alibi defense.

We further conclude that the error requires reversal of defendant's convictions because the prosecutor has failed to show that the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994); *Kurr, supra* at 327-328. A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). The party who benefited from the error must demonstrate that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *Anderson, supra* at 406; *People v Smith (On Remand)*, 249 Mich App 728, 730; 643 NW2d 607 (2002). The court's ruling forced defendant to forfeit presentation of a defense in order to exercise his statutory right to instructions on lesser included offenses. *Cornell, supra* at 354. The court's ruling infringed on his constitutional right to present a defense.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a *fundamental* element of due process of law." [*People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984), quoting *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967) and also citing US Const, Ams VI, XIV; Const 1963, art 1, §§ 17, 20.]

Plaintiff has failed to show that there is no reasonable possibility that the loss of the alibi defense did not contribute to the verdict. The evidence against defendant was not overwhelming. Neither the victims nor the other eyewitnesses could identify the shooter. There were discrepancies between the laser gun alleged to have been used by defendant and the evidence of the shooting, as well as other discrepancies that undermined the case against defendant. The substance of the alibi witnesses' testimony is unknown. However, a strong alibi would have enhanced the value of the defense's efforts to show discrepancies between the gun and the witnesses' observations and to disavow defendant's confession.

Moreover, the damage of the court's ruling was not only the loss of evidence, but also the loss of credibility to the defense case caused by a shift in strategy. As a result of the court's ruling, defense counsel did not deliver on his promise in his opening statement to produce evidence that defendant was not the perpetrator. The prosecutor capitalized on the shift in the defense theory of the case by arguing to the jury that defendant's defense had changed during the trial. The existing record does not show that the error did not contribute to the verdict with regard to the offenses charged, all of which arose from the shooting. Defendant's convictions must therefore be reversed.

### III

Having decided that reversal of defendant's convictions is required, we need not decide the remaining issues. We note, however, that defendant's remaining arguments are unpersuasive.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Brian K. Zahra